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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1642

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT MARRIOTT CORPORATION BRIEF IN OPPOSITION

Marriott Corporation prays that petition for certiorari be denied in this case.

All references to the Transcript of Record will be designated: (R.T. (page)). All references to the Decision of the N.L.R.B. will be designated: (Bd. (page)). All references to the Petition for Writ of Certiorari will be designated: (Pet. (page)).

QUESTION PRESENTED

Whether International Association of Machinists and Aerospace Workers; AFL-CIO, (I.A.M.), Petitioner herein, and Lufthansa German Airlines violated Section 8(e) of the National Labor Relations Act, as amended,[1] (N.L.R.A.), by entering into and maintaining a "hot cargo" agreement which required Lufthansa to virtually cease doing business with Marriott In-Flite Services, a Division of Marriott Corporation.

STATEMENT

I. The Parties

Lufthansa German Airlines is a corporation existing under the laws of the Federal Republic of Germany. (R.T. 34) It is in the business of providing air transportation of goods and passengers to and from points within the United States and other countries. As such, it is a "carrier by air" within the meaning of §201 of the Railway Labor Act.[2]

Marriott In-Flite Services, a Division of Marriott Corp., is a Delaware corporation engaged in providing catering services for various airlines operating out of cities within the continental United States. These services consist of the preparation, production and loading of food and beverages to be consumed by passengers during the flight. (R.T. 35, 38)

[1] 29 U.S.C. § 151 et seq.
[2] 45 U.S.C. § 151 et seq.

It is undisputed that Marriott is an "employer" within the meaning of Sec. 2(2) of the N.L.R.A. Lufthansa is one of the customers for which Marriott provides in-flight food services.

I.A.M. is an organization existing for the purpose of dealing with employers concerning terms and conditions of employment of employees. As such, I.A.M. was found by the N.L.R.B. to be a "labor organization" within the meaning of Section 2(5) of the N.L.R.A.

2. Background of the Dispute

As part of its operations within the United States, Lufthansa has maintained a catering facility at Kennedy International Airport in New York City, New York, since 1959. This facility prepares part of the food served to passengers on Lufthansa flights from Kennedy. (R.T. 36)

This catering facility at Kennedy is the only one maintained by Lufthansa. All catering for flights from other airports has historically been obtained through subcontracting. (R.T. 36)

In 1961, Lufthansa recognized I.A.M. as the exclusive collective bargaining representative of all catering employees — *i.e.*, the Kennedy employees. (Bd. 4). However, because Lufthansa historically had subcontracted most of its catering, both parties consented to the continuation of such practice where:

1) Such work was historically subcontracted;

2) No catering facilities were available;

3) The work load was insufficient to establish catering facilities at that location. (R.T. 225)

Thereafter, up to 1971, each collective bargaining agreement contained this provision as to subcontracting.

Because of these agreements, Lufthansa continued to contract with Marriott for the catering of flights out of Chicago's O'Hare Airport. (R.T. 41) In 1969, Lufthansa became dissatisfied with the catering done by Continental Airlines for Lufthansa flights out of Los Angeles. Therefore, Continental's services were terminated, and Marriott was engaged to provide the Los Angeles catering. (R.T. 36)

3. The Dispute

As a result of the termination of the contract with Continental Airlines, four I.A.M. members lost their jobs. (Bd. 5) Therefore, when contract negotiations between I.A.M. and Lufthansa were opened in 1970, I.A.M. insisted that Lufthansa cease doing business with Marriott at all locations except Boston where the catering service was valued at less than $1,000 per year. (R.T. 37)

Indeed, I.A.M. became quite vehement in its demands that only union caterers be used, with one union representative going so far as to threaten a Lufthansa representative that:

> " . . . if he enjoyed living he had better consider the utilization of union caterers and terminate the

services of non-union caterers[3] like Marriott In-Flite Services." (R.T. 69, 70)

Because of this pressure by I.A.M. to cease doing business with non-union caterers, Lufthansa refused to hire Marriott to service flights of their 747 airplanes out of JFK. Instead, a union caterer was hired, even though Lufthansa had earlier planned on using Marriott's services for these flights. (R.T. 43, 68)

I.A.M. was not content, however, in merely preventint Lufthansa from doing additional business with non-union caterers. It was determined to force Lufthansa to cease doing virtually all business with Marriott.

To this end, I.A.M. pressured Lufthansa into a new collective bargaining agreement and Memorandum of Understanding signed February 12, 1971, whereby Lufthansa agreed to employ certain specified caterers at all locations where Lufthansa did business. (Pet. 9-10)

These specified caterers were all union caterers.[4] The result of this agreement was to cause Lufthansa to cease doing business with Marriott at Chicago and Los Angeles, and therefore, to substitute a union caterer for a non-union caterer upon a demand of I.A.M. (R.T. 37).

[3]Although I.A.M. has earnestly endeavored to represent Marriott's employees (R.T. 60), these employees have consistently elected to have no union representation. (R.T. 37).

[4]Because Marriott was allocated only the Boston catering, valued at less than $1,000.00 per year, for all intents and purposes this provision will be deemed to have not existed.

The ultimate question presented here is whether this agreement violates Section 8(e) of the National Labor Relations Act.

4. Course of Proceedings Below

On March 19, 1971, a charge was filed with the Regional Director for the 31st Region of the National Labor Relations Board by Marriott In-Flite Services, Division of Marriott Corporation (hereinafter called "Marriott"), charging the I.A.M. and Lufthansa with violating Section 8(e) of the N.L.R.A. by reason of the agreement described above.

In a decision dated May 31, 1972, the National Labor Relations Board found that Lufthansa and I.A.M. had violated Sec. 8(e) of the N.L.R.A. Therefore, the Board made an order directing Lufthansa and I.A.M. to cease and desist from giving effect to the "hot cargo" provisions in their present agreement and to refrain from making such contracts in the future.

As a result of this decision, an order was entered on June 9, 1972, by the United States District Court for the Central District of California dissolving a temporary injunction against Lufthansa and I.A.M. obtained by the N.L.R.B. Thereafter, on July 5, 1972, Lufthansa notified the National Labor Relations Board that it did not intend to comply with the Board's order pending this appeal. It should be noted that this is in direct contravention

of Sec. 10(g) of the N.L.R.A., which provided for implementation of the Board's order absent a specific court order staying the Board's order.

Meanwhile, petitions for review of the Board's decision by the Ninth Circuit Court of Appeals were filed by Marriott on June 5, 1972, and by I.A.M. on June 27, 1972.[5] The National Labor Relations Board filed a cross-application for enforcement of its order on July 11, 1972. These cases were then consolidated by the Ninth Circuit upon a motion of all parties.

ARGUMENT

In resolving the question presented herein, the Court must determine the legal issue of whether the National Labor Relations Board has jurisdiction under Section 8(e) of the N.L.R.A. to declare void and unenforceable an agreement between a union which is subject to the N.L.R.A. and an employer which is subject to the Railway Labor Act (for the conduct of its own employer-employee relations) where the agreement was tactically calculated to affect the labor relations of another employer which is subject to and protected by the N.L.R.A.

The real target of the Lufthansa-I.A.M. "hot cargo" agreement was Marriott. The I.A.M. had tried unsuc-

[5]Marriott Corporation sought review of the Board's Order on the ground that it omitted an award of attorney fees and costs requested by Marriott Corporation. Marriott also filed a Supplemental Brief supporting the Board's Order in all other respects.

cessfully to organize Marriott employees prior to the "hot cargo" agreement. (R.T. 59-60)

Petitioner apparently concedes that the Lufthansa-I.A.M. agreement contains "hot cargo" provisions. Its sole defense is that such agreement, not illegal under the Railway Labor Act, is not subject to the N.L.R.A. under Section 8(e).

However, the conflicts, or disputes, involved herein are not pure and simple Railway Labor Act disputes.

It is argued at length by I.A.M. that it is not a "labor organization" within the meaning of Section 2(5) of the N.L.R.A. despite a Circuit Court of Appeals case to the contrary.[6] In so arguing, I.A.M. relies upon the Supreme Court decision in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

> And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act *in a dispute with carriers subject to the Railway Labor Act*, the organizations must be deemed pro tanto, exempt from the Labor Management Relations Act. (394 U.S. at 376) (Emphasis supplied)

In the *Jacksonville Terminal* case, the dispute *was* "a railway labor dispute, pure and simple." 394 U.S. at 377

In the instant case, I.A.M. was engaged in a dispute,

[6] *International Brotherhood of Electrical Workers v. N.L.R.B.*, 350 F.2d 791 (D.C. Cir. 1965), Cert. denied 383 U.S. 943 (1966).

albeit one-sided, with Marriott, who is *not* a carrier subject to the Railway Labor Act. Therefore, this important distinction renders the Supreme Court decision in *Railroad Trainmàn* inapposite.

Petitioner's legislative history arguments are likewise without merit.

I.A.M. juxtaposes Section 8(e) of the N.L.R.A. with Section 8(b)(4)(A) of the same act. The only valid juxtaposition of Section 8(e) is with Section 8(b)(4)(B) of the N.L.R.A.

Because of their disagreement with the House Labor Committee bill, Representatives Landrum and Griffin sponsored a substitute bill with provisions aimed directly at plugging the various loopholes in the secondary boycott law.[7] This bill included a Section 8(e) provision broader than the House bill or the Gore amendment to the Senate bill. As the Supreme Court noted in *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U.S. 612, 637 (1967).

> The substitute Landrum-Griffin bill, however, expanded the proposal to cover *all industry* and not common carriers alone. H. R. 8400, §705(b) and (1) in I 1959 Leg. Hist. 683. Representative Landrum stated, "I submit if such contracts are bad in one

[7]H. R. REP. NO. 741, 86TH CONG., 1ST SESS. 99-100, in I 1959 LEG. HIST. 857-858 (Additional Views); H. R. 8400, Section 705, in I 1959 LEG. HIST. 680-683. See the analysis of the bill by Representative Griffin, 105 CONG. REC. 14347, in II 1959 LEG. HIST. 1522-1523.

segment of our economy, they are undesirable in all segments." 105 CONG. REC. 14343, II 1959 LEG. HIST. 1518. (Emphasis supplied.)

This bill also sought, under a new Section 8(b) (4) (B), to shield employers, both statutory and non-statutory employers, from strikes or threats aimed at forcing them to agree to hot cargo agreements. This was done by making such conduct illegal where its object was to force or require "any *person* to cease, *or to agree to cease*, using, selling handling, transporting [etc.] . . . the products of any other . . . or to cease, *or agree to cease*, doing business with any other person . . . " (Emphasis supplied)[8] Other loopholes were similarly closed by the language of the revised provision proscribing secondary boycotts.[9] See *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964) for a discussion of the amendments ultimately adopted to close the loopholes.

The House, after lengthy consideration, passed the Landrum-Griffin bill with no change in the language of the Section 8(e) and 8(b) (4) (B) provisions.[10] In Conference Committee, the provisions of the House bill as

[8]H. R. 8400, §705(a), in I 1959 LEG. HIST. 680-681. See Griffin analysis, 105 CONG. REC. 13091-92, in II 1959 LEG. HIST. 1522-1523.

[9]See analyses of the Landrum-Griffin bill by Representative Griffin, 105 CONG. REC. 13091-92, in II 1959 LEG. HIST. 1522-1523 and by Senator Kennedy and Representative Thompson, 105 CONG. REC. 15220-23, in II 1959 LEG. HIST. 1706-1709.

[10]105 CONG. REC. 14519-14541, in II 1959 LEG. HIST. 1691-1702. H. CONF. REP. NO. 1147 on S. 1555, 86TH CONG., 1ST SESS. 38-40, in I 1959 LEG. HIST. 942-944.

to Sections 8(e) and 8(b) (4) (B) were adopted substantially without change, and the Conference Report was agreed to by both houses. 105 CONG. REC. 16435, 16653-54, in II 1959 LEG. HIST. 1452-1453, 1738-1739.

Indeed, the only material change was in the language of §8 (b) (4) (B). The language read "cease, *or agree to cease*, using, selling, etc. . . ." "or to cease *or to agree to cease* doing business with any other person . . . " (Emphasis supplied.) The Conference Committee, after deliberation, concluded that the underlined portions above should be deleted as they were a duplication of the activity proscribed in the new Section 8(e).[11]

Now, this deletion is quite substantial, as it clearly indicates that Congress intended that those persons who were prohibited from engaging in secondary activity under Section 8(b) (4) were *the same persons who were prohibited from entering into voluntary agreements to boycott under Section 8(e).*

It is well settled that, had I.A.M. engaged in a strike to force Lufthansa to cease doing business with Marriott, the Board could order that such activity be ceased as violative of Section 8(b) (4) (B).[12]

The conclusion is inescapable that, had the words "or agree to cease" been left in Section 8(b) (4) (B), a

[11]H. CONG. REP. NO. 1147 on S. 1555, 86TH CONG., 1ST SESS, 38-40, in I 1959 LEG. HIST. 942-944.

[12]N.L.R.B. v. Servette, Inc., 377 U.S. 46 (1964).

voluntary agreement by I.A.M. and Lufthansa to boycott Marriott would be violative of Section 8(b) (4) (B).

However, as was seen above, these words, "or agree to cease" were stricken as being duplicative of the new Section 8(e).

Therefore, it is necessary to read Section 8(e) in conjunction with Section 8(b) (4) (B) in order to determine the identity of those prohibited from both forced and voluntary boycotts. Indeed, the Supreme Court has recognized the close relationship between these two sections.

> "Although the language of § 8(e) is sweeping, it closely tracks that of § 8(b) (4) (A) [now 8(b) (4) (B)] . . . "[13]

Thus, it is clear that a reading of Section 8(e) should treat this section as an extension of Section 8(b) (4) (B). Such a reading results in the conclusion that the word "employer" in Section 8(e) refers to "employer in its dictionary sense,"[14] rather than to "employer" as defined in Section 2(2) of the N.L.R.A.

This conclusion is buttressed by the opinions of key legislators of the 1959 amendments to the N.L.R.A.; 105 CONG. REC. 14195, in II 1959 LEG. HIST 1568 (Rep. Griffin: "Our substitute bill would ban all hot cargo agreements"); 105 CONG. REC. 5633, in II 1959 LEG.

[13]*National Woodwork Mfrs. Assn. v. N.L.R.B.*, 386 U.S. 612-621 (1967)

[14]Senator Goldwater on Section 8(e), II Leg. Hist. 1829.

HIST. 1052 (Sen. McClellan: All "'hot cargo contracts' are absolutely wrong, they should not be tolerated in a free society and a free economy") 105 CONG. REC. 16539, in II 1959 LEG. HIST. 1712 (Rep. Griffin: the conference bill bans all "hot cargo agreements: except for the garment and construction industries").

Since Section 8(e) was adopted for the same purpose as the 8(b) (4) (B) amendments, and its reach was intended to be coextensive with that of 8(b) (4) (B), it is plain that Congress intended 8(e) to cover non-statutory employers as well. Otherwise, Congress must be held to have intended the unreasonable result of creating a loophole in a measure designed to plug a loophole.

More important, there is nothing in the legislative history which indicates any desire on the part of any congressional representative or committee to exclude non-statutory employers from the reach of Section 8(e), or any concerns about including them within the intendment thereof. The absence of any indicia of such congressional intent, in the face of Congress' otherwise clearly expressed intent to provide sweeping protections for all employers against forms of secondary activity, including hot cargo agreements, compels the conclusion that Congress intended to include non-statutory employers within the reach of the hot cargo provision.

CONCLUSION

From the argument above, it is clear that the status

of Lufthansa as a "carrier by air" under the Railway Labor Act does not exempt the present dispute from the jurisdiction of the N.L.R.B. As this Court has explained in *Local Union No. 25 Teamsters v. New York, New Haven & Hartford R.R. Co.*, 350 U.S. 155, 159-161 (1956),

> The Act, in its definition of an "employer," expressly excludes anyone subject to the Railway Labor Act. 61 Stat 137, 29 USC § 152(2). It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act, which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution. But it does not follow from this that a railroad is precluded from seeking the aid of the Board in circumstances unrelated to its employer-employee relations.

It seems elementary that the present dispute does not involve the employer-employee relations of Lufthansa, but rather involves an attempt by I.A.M. to force unionization of non-union employers in the catering industry. Here Lufthansa is the neutral employer, within the usual concepts of secondary boycotts. Thus, Lufthansa is afforded the protection of the N.L.R.A. from strikes to force it to cease doing business with Marriott under Section 8(b) (4) (B) of the N.L.R.A. Likewise, Lufthansa

and Marriott are each afforded the "protection" of the N.L.R.A. against voluntary agreements to boycott Marriott, even though Lufthansa, in the context of the threats of I.A.M., ostensibly prefers to be outside the jurisdiction of the N.L.R.A.

This Court held, *prior to the 1959 amendments*, that the exemption of Railway Labor Act carriers from the N.L.R.A. did not extend to those circumstances where the railroad "occupied the status of a neutral or secondary employer." *Local Union No. 25, Teamsters v. New York, New Haven & Hartford R.R. Co.*, 350 U.S. at 160 (1956).

From the above discussion, it would appear that, even prior to the 1959 amendments, Railway Labor Act employers were subject to the jurisdiction of the N.L.R.B. under certain conditions, despite their exclusion under Section 2(2) of the N.L.R.A. However, any doubt as to their inclusion under the secondary boycott provisions of the N.L.R.A. was resolved by the enactment of Sections 8(b) (4) (B) and 8(e) in 1959.

As was previously established, Railway Labor Act employers are covered by the provisions of Section 8(e) because Congress intended that the words "any employer" contained therein be defined in their dictionary sense. Although I.A.M. agrues vigorously against such a reading, it is obvious that a contrary interpretation would frustrate the Congressional intent.

Contrary to Petitioner's contention (Pet. 25), the Board and the Court of Appeals have not brought the Railway Labor Act and the National Labor Relations Act into collision. The admixture of rights, obligations and protections of the two Acts have been recognized by this Court.[15] The present case presents no deviation from prior decisions of this Court.

The petition should be denied.

Respectfully submitted,

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[15] *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969); *United Steel Workers v. N.L.R.B.*, 376 U.S. 492, 501 (1964); *Local Union No. 25, Teamsters v. New York, New Haven & Hartford R.R. Co.*, 350 U.S. 155 (1956). *Cf. I.B.E.W. v. N.L.R.B.*, 350 F.2d 791 (D.C. Cir. 1965), *Cert denied* 383 U.S. 943 (1966).